LIM SEOW WAH & ANOR.

v.

HOUSING & DEVELOPMENT BOARD & ANOR.

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 9099 OF 1984]
27 DECEMBER 1990

TORT: *Negligence - Building site - Trespassers - Evidence of signposts - Occupiers - Duty of care - Whether accessible to public - Lack of safety net - Damages - Lost years - Civil Law Act [Sing], ss. 8, 12.*

The 2nd defendants D2 were building contractors who were constructing a 25 - storey block of flats (the building) for the 1st defendant, D1. On 19 December 1981 the building had been completed and D2 were in the course of hacking the uneven walls for plastering. During the construction, a safety net had been strung across the walls to catch falling stones and debris. In addition, a wooden fence around the construction site prevented the public from having access to the works. These were removed after completion of the structure.

At the ground floor of the building, there was a coffee-stall which was operated by a licensee of D2. LKT, a member of the public was living next to the building site; on a rainy day while on his way towards the coffee stall, LKT was struck by something falling from above - he consequently died on 25 December 1981 as a result of a fractured skull.

The issue here is whether D2 owed a duty of care to LKT and whether LKT was a trespasser.

Held:

[1] The evidence adduced by the plaintiffs show that at the material time members of the public had full and unrestricted access to the site to patronise the coffee stall.

[2] There was no evidence whatever, that the stall holder was not allowed to sell food and/or drinks to people other than the workers. There was no fence around the site, and people were allowed to come and go; therefore LKT and PW2 were not trespassers.

[3] There was evidence that there was no other coffee-stall in the vicinity therefore LKT and PW2 were licensees in the sense that they were free to patronise the coffee stall.

[4] Even if they were trespassers, the defendants ought to have foreseen such trespassers coming to the coffee-stall to patronise it.

[5] The works created a danger and there ought to have been a safety net at the second level to catch falling debris; although there was such a safety net but, it was removed by the 2nd defendants' workers for the wrong reason.

[6] The evidence shows that the warning signboards on the site were put up immediately after the accident.

[7] The defendants owed a duty of care to all those who came to the site to patronise the coffee-stall, therefore they accordingly owed a duty of care to LKT and they had breached their duty of care in not putting up a safety net where and when their employees were hacking the walls of the building. The works created a danger and LKT was a foreseeable victim.

[Judgment for the plaintiff.]

Cases referred to:
British Railways Board v. Herrington [1972] AC 877
Lembaga Letrik Negara v. Ramakrishnan [1982] 2 MLJ 182; [1982] CLJ 401
Southern Portland Cement Ltd. v. Cooper [1974] AC 623

Legislation referred to:
Civil Law Act [Sing], ss. 8, 12

Other source referred to:
Clerk & Lindsell on Torts 15 Edn., at para. 12-52 (635)

For the plaintiffs - Vijay Kumar
For the defendants - Lawrence Chua

JUDGMENT

Chan Sek Keong J:

This is an action for damages made under ss. 8 and 12 of the Civil Law Act in relation to the death of one Lim Kim Tong (LKT) following an accident on 19 December 1981 at a construction site which was, at the material time, occupied by the 2nd defendants. The claim against the 1st defendants (who were the owners of the site) was, by consent, discontinued at the conclusion of the hearing of this action.

The 2nd defendants were building contractors who were constructing a 25-storey block of flats ("the building") for the 1st defendants. The site of the building was bounded on one side by a large canal, *viz.*, the Alexandra Canal and on the opposite side by Ganges Road, and on one side by a school, *viz.*, the Delta West School, which was fenced off from the site, although there was a gate leading into the site, and on the opposite site by another road, *viz.*, Delta Road.

On the date of the accident, the 2nd defendants had already completed the entire structure of the building and were in the course of hacking the uneven walls in preparation for plastering them. During the construction of the building a safety net had been strung across the walls to catch any falling stones and debris. A gondola was used to hack the 25 floors of the building. It was hanging beside the wall on the 14th level at the time of accident. Also, during construction, the public was prevented from having access to the works by a wooden fence or hoarding. Both the safety net and the fence was also taken down after the completion of the structure.

There was located on the ground floor of the building at the material time a coffee stall. This stall was operated by a licensee of the 2nd defendants from the beginning of the construction works to cater to the needs of the workers. There is a conflict of evidence as to whether members of the public were allowed to buy drinks and food from this stall. The plaintiffs have produced 3 witnesses who testified that members of the public had full access to the stall and frequented the stall as it was the only coffee stall within the surrounding area. The 2nd defendants' witness, the supervisor, said that the stallholder was allowed to sell drinks and/or food to the workers and no one else. Having heard the witnesses, I believe the evidence of PW1 and PW2 and find that there was no restriction whatever against the stallholder selling drinks and food to any person who patronised it. The coffee stall was accessible to members of the public. There was no conceivable reason for them to do so since the 2nd defendants claimed that they had put up adequate fencing/hoarding to prevent members of the public from going into the construction site. In any case, the important point was whether at the material time, the site and the coffee stall were accessible to the public. In my view, the evidence clearly establishes that both were accessible to the public.

The question is whether the 2nd defendants were negligent as regards LKT, who was a member of the public. LKT was then living at Block 79, Indus Road which was situated next to the building site. He was then 18 years old. His friend, Lim Hang Huat (PW2), testified that on the afternoon of 19 December 1981 at about 1 pm, he and LKT went to a nearby kampong to catch spiders. It began to rain about half an hour later. They wanted to look for shelter in the building as well as have a cup of coffee. They ran to the building, went under it on the ground floor on one side of it and continued to run towards the coffee stall. To reach the coffee stall by the most direct route, they have to cross an open space between two sections of the building. As they were crossing this space, LKT who was running ahead, was struck by something falling from above. PW2 heard the sound of a stone or a lump of cement. LKT fell on the ground. Something also fell on PW2's thigh but he was not injured. LKT began to bleed and appeared unconscious. PW2 dragged him into the covered section of the building. The Indian stallholder and some workers came to look. PW2 ran to inform PW1, the father of LKT.

PWl testified that upon being informed of the accident, he ran to the site. He found LKT lying on the ground and bleeding. It was raining heavily. He carried his son to the side. LKT was conscious and "struggling" and shouting that someone threw a stone at him. Later the ambulance arrived and took him to hospital. He fell into a coma in hospital and died on 25 December 1981.

The post-mortem report on LKT disclosed that he died from a fracture of the skull. His skull had "a large burn hole at right parietal bone 8 x 7 cm. There was a fracture of the right tempos bone 8 cm with extradural haemorrhage." The Coroner found and I agree with him that the injury was caused by a hard object falling on the head of LKT.

I also find as a fact from the evidence adduced by the defence witness that the hard object was probably a stone or a lump of hardened cement which had fallen from the side of a wall or the gondola which was hanging in the air next to the wall. The profile of a "burr hole" in the skull would suggest, most likely, a piece of hardened cement. Whatever it was, it either came off the wall or fell from the gondola. I have already mentioned that at this time the defendants were hacking the uneven walls of the building, and it may therefore be inferred that the falling object was a lump of uneven hardened cement.

The next issue of fact on which I make a finding is that on the evidence adduced before me there was insufficient reason for the 2nd defendants' workers to remove the safety net in order to do the hacking work. DW2, the site foreman, testified that the net was removed because it impeded access to the gondola. I cannot agree. He was unable to explain why the net could not have been strung up in a way which allowed access to and from the gondola. In fact, he said that the safety net was taken off because it was their practice to do so. If the netting had not been taken off, this particular tragedy would not have happened. I think that the workers failed to appreciate the hacking work would pose a risk of injury to members of the public by falling lumps of cement.

It was also a fact in issue whether the defendants had placed warning signboards on the building to warn the public to keep out of the site. The plaintiffs called 2 witnesses to testify on this issue. One of them (PW4), the brother in law of the deceased, who was also living in Block 79, testified that he went to the scene of the accident at about 2 pm to take a look. He saw a pool of blood at the spot where LKT had fallen. He did not see the signboard (as shown in P9 which photograph was taken sometime after the accident. Since it was taken by the police in daylight, it could only have been taken on the following day at the earliest).

After that he went home, and shortly after that he saw a red car stopping near where the place of the accident and 3 or 4 men taking out signboards from the boot of the car. The men then nailed the signboards to the building. He, of course, would not see P9 being marked to the building. He also said that he informed his wife, who was LKT's sister, and also other members of LKT's family what he had seen the following day.

The second witness was PW3, a reporter with the Sin Chew Jit Poh. He testified that he received a telephone call from PWl on the day of the accident. He and his photographer went to LKT's house but were told that PW1 was at the hospital. They went to the hospital and met PW1 who told them about the condition of LKT and the nailing of the signboards after the accident. On the following day, he went to the site with PWl who repeated his allegation concerning the signboards. PW3 and his photographer took a look at P9. He observed that the nails were new and not rusty. He and the photographer agreed with PWl's allegation about the signboards having been put up very recently. They then wrote a report about the accident which was published in the newspaper the following day.

The defendants called 3 witnesses to testify on this issue. The first, DW1, was a sergeant then attached to the Tanglin Police Station. He was informed about the accident at about 5.05 pm but he did not visit the scene until about 7-7.30 pm when it was already dark. (In his evidence at the Coroner's inquiry, he said he arrived at the scene at about 7.40 pm). He said he saw P9 and another signboard. However, this other signboard was not shown in any of the photographs tendered in Court. In my view, DW1's evidence was wholly inadequate and was insufficient to prove that P9 had been there before the accident.

The second witness for the defence was DW2. His evidence was that there were signboards on all sides of the building prior to the accident. He said that they were put up after the completion of the ground level of the building, and that the signboards were in 3 languages.

The third witness, DW4, was a former safety officer employed by the HDB whose job was to inspect all the sites where the HDB had buildings under construction. He was in charge of more than 100 sites. He said he saw warning signboards on the building when he visited the site about 2 months before the accident. However, he could not mark them correctly at the locations he said he had seen them. In my view, the evidence of DW4 was also of no assistance to the defendants.

The only independent witness in relation to P9 was PW3. He was a reporter who had been informed of the accident and he went there to investigate. I accept his evidence that when he took a look at P9 he found that the nails were new and not rusty. Since DW2's evidence was that P9 had been there since the completion of the 1st storey, it was impossible for the nails not to have been rusty. Accordingly, I find that P9 was put up immediately after the accident before the arrival of PW3.

To summarise my findings of fact: at the material time, (a) the building was not fenced off; (b) it was accessible to the public; (c) the coffee stall next to it was also accessible to the public, members of which patronised it; (d) hacking work was going on; (e) there was no safety net to prevent falling debris from injuring any person who happened to be at that spot; (f) a gondola was left hanging in the air between the walls; and (g) there was no signboard warning people not to go to the site or walk through the building. The question is whether the defendants were negligent in these circumstances.

The submission of Counsel for the defendants was that the defendants owed no duty of care to LKT as he was a trespasser who had also been warned by signboards of the dangers of entering the site. He also submitted that even if there were no signboard, LKT, by reason

of his age, ought to have known of the dangers and therefore the duty of care owed to him was an attenuated duty. Counsel relied on the House of Lords' decision in *British Railways Board v. Herrington* [1972] AC 877 as laying down the principle that an occupier only owed a

> duty of ordinary humanity,

which was

> at once more demanding than a duty merely to avoid reckless or intentional injury (which was the law before *Herrington's* case), but less demanding than a duty to take reasonable care.

Clerk & Lindsell on Torts 15 Edn., at para. 12-52 (635).

Counsel for the plaintiffs relied on the decision of the Federal Court in *Lembaga Letrik Negara v. Ramakrishnan* [1982] 2 MLJ 182 where it was decided, following *Herrington's* case and *Southern Portland Cement Ltd. v. Cooper* [1974] AC 623, PC, that:

> the duty owed to trespassers arises when the occupier knows of facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and that the duty is discharged by the occupier taking such steps to avoid it in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations.

In my view, the evidence adduced by the plaintiffs show that at the material time members of the public had full and unrestricted access to the site to patronise the coffee stall, which was run by a licensee of the defendants. There was no evidence whatever, apart from a mere assertion, that the stallholder was not allowed to sell food and/or drinks to people other than the workers. There was then no fence around the site, and people were allowed to come and go. On this evidence, I do not think that LKT and PW2 were trespassers. They sought shelter at the site when it was raining and they did so because they also wanted to have a drink. Since Block 79, which was where he lived, was just behind the building, LKT could have run home or sought shelter in some other buildings nearby. There was evidence that there was no other coffee-stall in the vicinity. I find that LKT and PW2 were licensees in the sense that they were free to patronise the coffee stall. In any case, even if they were trespassers, the defendants ought to have foreseen such trespassers coming to the coffee-stall to patronise it: see *Clerk & Lindsell* at para. 12-55 (640) where the principle is stated, which I accept that:

> The occupier ought in principle to be liable to a trespasser who is injured by the occupier's breach of duty towards his lawful visitors, if there are any; but, as a substantive rule of law - a qualification upon *Herrington's* case - an occupier ought not to be so liable to an adult who trespasses knowingly and without any reasonable excuse for doing so.

In the present case, LKT did not know of the danger and he had a reasonable excuse to come onto the site.

Stones and debris falling from the high floors of building sites are common occurrences. This is particularly so when the work involved is hacking of the walls. Bits of the hacked wall are likely to fall onto the gondola or down to the ground. I think that the works created a danger and there ought to have been a safety net at the second level to catch falling debris. There was such a safety net but, it was removed by the 2nd defendants' workers for the wrong reason. I think that they followed past practice and could not be bothered to

exert the extra effort to put up the safety net in a manner which did not impede the operation of the gondola. The defendants, for no good reason, removed the safety net, and his reason for doing so was that it was their practice to do so.

On the evidence before me, I find that the defendants owed a duty of care to all those who came to the site to patronise the coffee-stall, that they accordingly owed a duty of care to LKT, that they breached their duty of care in not putting up a safety net where and when their employees were hacking the walls of the building. The works created a danger and LKT was a foreseeable victim. Accordingly, I find for the plaintiffs on the question of liability. There was no question of contributory negligence on the part of LKT.

I now assess damages. LKT's employer, PW6, at the material time testified that LKT was assisting him at his hawker stall selling turtle soup. LKT was paid $15 per day with $4 allowance for meals. As PW6 was also a wholesaler of turtles which were imported from Indonesia, he would also send LKT to the airport twice a week to take delivery, for which LKT was paid $20 per trip. LKT worked 6 days a week. On this basis, LKT's annual earnings would be $19 per day X (365-52) $5947 + $2080 ($40 x 52) = $8027 per year. PW6 did not say that LKT was paid any CPF. PW6 also said that some of his assistants had opened their own stalls selling turtle soup and that he himself was earning net about $3,000 to $5,000 per month selling turtle soup.

The defendants called an investigator, DW3 to investigate the earnings of LKT. He said that he visited PW6's stall twice, but managed to meet a man who said that he was the boss of LKT and that LKT was being paid $8 per day. I am not able to admit this evidence as PW6 was not cross-examined on this point nor was DW3 asked to identify PW6. Without identification, this evidence was hearsay.

The plaintiffs also called LKT's mother as a witness and she testified that LKT was giving her about $300 per month.

Special damages have been agreed at $3457. I award $7000 for expectation of life and $1,500 for pain and suffering during the short period LKT was conscious.

This is a claim for lost years. I find it impossible to assess the prospective earnings of LKT. He was 18 years old when he died. He left school at Primary 5. He was then a hawker assistant, earning very good wages, compared with his two previous jobs. His job was precarious. Counsel for the plaintiffs has suggested that I should assess his maximum earning during his lifetime, had he lived, at $4,000 since PW6 was earning $3,000 to $4,000 per month on the basis that he might have become a turtle soup seller and earning that amount. I find no basis for making an assumption that LKT might have become a turtle soup seller or that he might have earned between $3,000 - $4,000 net per month. He might have gone through life as a hawker assistant or as an unskilled worker. Accordingly, I will assess his earnings as at about $8500 per annum. As for the available surplus, I would find that it would be in the region of 40%, having regard to the fact that he was giving his mother $330 per month. The multiplier is agreed at 15.

On this basis, the damages for lost years would be $8500 x 15 x 40% = $51,000. The total damages are $51,000 + $3457 + $7000 + $1500 = $61,415. There will be judgment for the plaintiffs in the sum of $61,415, with interest at the rate of 6% per annum from the date of the writ to date of judgment and costs to be taxed.

Also found at [1991] 1 CLJ 635